Supreme Court, U.S.
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No. 98 43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

DONELL AUSTIN,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR A WRIT OF CERTIORARI

JAMES E. RYAN
Attorney General
State of Illinois

WILLIAM L. BROWERS
Assistant Attorney General
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601

Attorneys for Petitioner

RICHARD A. DEVINE
State's Attorney
Cook County, Illinois

RENEE GOLDFARB*
KENNETH T. McCURRY
Assistant State's Attorneys
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496

Of Counsel

*Counsel of Record

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTIONS PRESENTED FOR REVIEW

Whether a criminal defendant can object to the use of a statement of a co-arrestee, who is in custody without probable cause, to establish probable cause for the defendant's arrest or to establish that any taint of the illegality involved in the defendant's arrest was attenuated.

Whether, if the statement of an illegally arrested co-arrestee establishes probable cause for a criminal defendant's arrest completely independent of the defendant's initial arrest without probable cause, it is necessary for the prosecution, in order to avoid imposition of the exclusionary rule, to establish attenuation between the defendant's initial illegal arrest and evidence recovered after probable cause has been established.

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OPINION BELOW

The respondent was found guilty of first degree murder and armed robbery in a bench trial in the Circuit Court of Cook County. The trial court sentenced him to consecutive terms of 55 years for first degree murder and 25 years for armed robbery. The Illinois Appellate Court, First District, reversed the convictions and remanded the matter for a new trial on November 26, 1997. That court's opinion is published as *People v. Austin*, 293 Ill.App.3d 784, 688 N.E.2d 740 (1997). On December 23, 1997, petitioner sought leave to appeal from the Illinois Supreme Court. The court denied leave to appeal on April 1, 1998.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C § 1257. Petitioner's petition for leave to appeal was denied by the Illinois Supreme Court on April 1, 1998. This petition is timely filed within 90 days thereafter.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent, Donell Austin, was indicted for the first degree murder of Rufus Simpson, as well as conspiracy to commit first degree murder, armed robbery, and residential burglary. Following a bench trial respondent was found guilty of first degree murder, conspiracy to commit first degree murder, and armed robbery. Subsequently, the trial court sentenced respondent to 55 years in the Illinois Department of Corrections for first degree murder and 25 years' imprisonment for armed robbery with the sentences to run consecutively.

Prior to trial, respondent filed a motion to suppress all evidence obtained as a result of his arrest. In that motion the respondent claimed that his Fourth Amendment right to be free from unreasonable seizure was violated when he was arrested without probable cause. As a result of that violation the respondent sought to have his post-arrest statement excluded from evidence.

The following evidence was presented at the hearing on the respondent's motion: On November 16, 1992, the body of Rufus Simpson was discovered. Simpson's family reported that his car, an Oldsmobile Ciera, was missing. The vehicle, which had been stripped and burned, was subsequently recovered over two months later, on January 23, 1993, next door to the residence of co-offender Bobby Walley.

On January 27, 1993, around 2 p.m., after reviewing the phone records from the residences of Simpson, and co-arrestees Bobby Walley and Eric Watkins, showing that calls had been made between each of their residences, Detective Michael Fleming and Sergeant Francis Lee went to the area where Simpson's car had been

found. Detective Fleming observed the respondent, Walley, Kevin Taylor, and Jamel Dorrough leaving Walley's residence and asked them to accompany him to Area Five Police Headquarters regarding the death of Simpson. The respondent agreed to accompany him and was patted down before being placed in the back seat of Detective Fleming's vehicle along with Walley, Taylor, and Dorrough. The respondent was not handcuffed.

They arrived at the police station around 2:30 p.m. and respondent was placed in an interview room. The door to the room was closed but was not locked and the respondent was not handcuffed. Around 3:30 p.m., Detective Fleming interviewed Taylor who gave him information regarding the death of Simpson. Taylor stated that he was present during a conversation between Watkins, Walley, Dorrough, and the respondent several weeks before the homicide during which Watkins was complaining about Simpson, his stepfather. Watkins had stated that he wanted to kill Simpson. Two days later, Taylor met with Walley who showed him a key ring with keys to Simpson's residence. Two days after the homicide, Dorrough told Taylor that they had killed Simpson and taken a video recorder and a television. Two weeks after the homicide, Taylor spoke to Watkins who stated that Walley, Dorrough, and the respondent had done the killing and not to say anything about it.

After speaking with Taylor, Detective Fleming interviewed Dorrough who admitted his involvement. Dorrough also implicated Walley and the respondent and indicated that they participated in the shooting and taking of property.

During cross-examination, Detective Fleming testified that he had no relevant information regarding the respondent at the time of the street encounter. Detective Fleming further testified that Taylor stated that the respondent was the shooter. The respondent was not formally arrested until 10 p.m., but he was not free to leave after Detective Fleming spoke with Taylor. The respondent was advised of his rights and told that he had been implicated in the murder.

During redirect, Detective Fleming testified that Dorrough had stated that he saw the respondent shoot Simpson.

After the People rested, co-defendant Walley called his brother Howard Walley who testified that he saw the police pat down his brother, Taylor, Dorrough, and the respondent and that the police handcuffed them together before placing them in the car.

Co-defendant Walley testified that he was walking to the rapid transit station with Taylor, Dorrough, and the respondent, when a squad car pulled up and two officers jumped out. Detective Fleming then stated not to run because he did not feel like shooting anyone. Walley testified that he was then cuffed to the respondent while Dorrough was cuffed to Taylor and that they asked why they were being arrested but the police did not respond. In the car, they were told that they were being arrested for fornication and arson.

During cross-examination, Walley testified that the signature on the handwritten statement taken by Assistant State's Attorney Adrienne Mebane looked "somewhat like his" and that in the statement he said that he was treated well by the police.

After Walley rested, all parties stipulated that incriminating statements were made.

The People called Sergeant Francis Lee in rebuttal who testified that he went with Detective Fleming to look at a car that was involved in a homicide. When they arrived in the area, they observed Taylor, Walley, Dorrough, and the respondent coming out of Walley's residence. After the four agreed to go to the police station, the officers patted them down but did not handcuff them.

After the prosecution rested in rebuttal, the trial court granted the respondent's motion, finding that the respondent did not voluntarily accompany the police to the station, but rather that he was arrested without probable cause.

The case was then continued for a hearing to determine whether events which occurred between the arrest and the respondent's statement purged the illegality of the arrest. At that hearing Detective Fleming testified that he spoke with the respondent around 4:15 p.m. and that he advised the respondent of his rights but that respondent made no admissions. At 4:30 p.m., Detective Fleming spoke with Taylor for approximately half an hour. Taylor told Detective Fleming that he was present for a conversation in which the respondent, Walley, Eric, and Dorrough discussed killing Simpson.

Around 5 p.m., Detective Fleming had a second conversation with Dorrough during which he admitted being at Walley's residence prior to the murder with the respondent and Taylor when Watkins stated that he wanted to kill Simpson. Dorrough was later shown keys to Simpson's residence by Walley. Dorrough further

admitted that he was present with the respondent, Walley, and Watkins when Simpson was killed. Dorrough stated that the respondent shot Simpson in the back of the head. After Simpson was killed, Dorrough took a television which he kept.

Around 5:30 p.m., Detective Fleming told Walley what he had learned from Taylor and Dorrough, and Walley agreed that it was correct.

Detective Fleming had a second conversation with the respondent around 6 p.m. in which he told respondent what he had learned from Taylor and Dorrough but the respondent did not make a statement. Between 6:30 and 7:30 p.m., Detective Fleming had another conversation with Dorrough during which Dorrough stated that the rifle jammed after the respondent shot Simpson. Detective Fleming also spoke with Walley during that time and Walley stated that he kept the VCR he took at his house until it was stolen. Walley also stated that he drove Simpson's car for a while before stripping and burning it.

Around 7:30 p.m., Detective Fleming had a third conversation with the respondent and told respondent what Dorrough said about the gun jamming. The respondent then stated that he was at Simpson's house and that he took a keyboard but it did not work so he threw it away. The respondent then stated that since they knew everything else that happened he might as well tell them that he did the shooting too.

During cross-examination, Detective Fleming testified that Taylor initially denied having any knowledge of the murder and that Taylor admitted that he knew about the murder during their second conversation. Detective

Fleming also testified that Dorrough stated that he gave the rifle to the respondent.

Both parties stipulated that Assistant State's Attorney Mebane spoke with the respondent around 2 a.m. and that she read him his rights. It was further stipulated that the respondent told Ms. Mebane that he had been treated well by the police. At the conclusion of the hearing the trial court found that respondent's statement was attenuated from his illegal arrest. The trial court filed a memorandum opinion in which it found that "probable cause to arrest can constitute an intervening circumstance and attenuate the taint of an illegal arrest." The trial court found the statements of the other persons arrested gave the police probable cause to arrest respondent and therefore was an intervening circumstance sufficient to purge the taint of the illegality involved in the respondent's arrest.

On direct appeal the Illinois Appellate Court reversed the respondent's conviction and remanded the matter for a new trial. To reach this conclusion the court held that the statements of those arrested with the respondent could not be considered as factors attenuating the connection between the respondent's arrest and the later giving of his statement because those statements came from persons who had also been illegally arrested.

Following the appellate court opinion, the petitioner sought leave to appeal from the Illinois Supreme Court. That court denied review on April 1, 1998.

ARGUMENT

INTRODUCTION

In reversing the respondent's conviction, the Illinois Appellate Court held that the statements of those arrested with respondent, because those persons themselves were arrested without probable cause, could not be a consideration in determining, under *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975), whether the respondent's inculpatory statement was sufficiently attenuated from his arrest to be admissible at trial. This holding raises two related questions, each concerning the reach of the exclusionary rule where a violation of the Fourth Amendment is established.

The first question is whether a criminal defendant can object to the use of a statement of a co-arrestee in custody without probable cause, not as evidence at trial, but either to establish probable cause for the defendant's arrest or to establish that any taint of the illegality involved in the defendant's arrest was attenuated. The second question is whether, if the statement of an illegally arrested co-arrestee is sufficient to establish probable cause for a defendant's arrest, there is even a necessity for an attenuation determination where, at the time the police obtained inculpatory evidence from the defendant, there was probable cause for his arrest.

I.

SINCE THE VOLUNTARY STATEMENTS OF THOSE ARRESTED WITH THE RESPONDENT WERE NOT OBTAINED IN VIOLATION OF THE RESPONDENT'S FOURTH AMENDMENT RIGHTS, THE RESPONDENT CANNOT OBJECT TO THE ADMISSION OF THOSE STATEMENTS AS INTERVENING EVENTS ATTENUATING THE CONNECTION BETWEEN THE RESPONDENT'S ILLEGAL ARREST AND HIS EVENTUAL STATEMENTS.

In *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341 (1914), this Court fashioned the exclusionary rule which barred the admission of evidence against a person when the evidence was obtained through a violation of that person's Fourth Amendment rights. This exclusionary rule was made applicable to the States through the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961). The Court in *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961 (1969), restricted the applicability of the exclusionary rule in illegal search cases by allowing it to be "successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." 89 S.Ct. at 965. This concept was reiterated in *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421 (1978), where the Court found it "proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections." 99 S.Ct. at 425.

In *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975), the Court stated that, where a defendant was arrested without probable cause, evidence obtained as a result of the defendant's custody would not be subject to exclusion if the prosecution could establish that events

intervening between the illegal arrest and the discovery of the evidence attenuated the causal relation between the two. In the present case there was an attenuation hearing as contemplated by *Brown*, and the trial court found that confronting the respondent with the statements of those arrested with the respondent so weakened the connection between the respondent's arrest and his statements that his statements could be admitted at trial. The Illinois Appellate Court held that the State could not point to the statements of the co-arrestees as attenuating factors because those statements themselves were obtained in violation of the co-arrestees' Fourth Amendment rights.

While this Court has never directly addressed the issue in the present case, there now exists a conflict between the courts which have. The issue arose in *United States ex rel. Wright v. Cuyler*, 563 F.2d 627 (3rd Cir. 1977), where the defendant was among a group of suspects arrested without probable cause. While the defendant was in custody, other arrestees gave statements incriminating themselves as well as the defendant. In rejecting the defendant's argument that the statements of the co-arrestees could not be used to sever the causal connection between the defendant's improper arrest and his later statement, the court held that the defendant simply had no standing to contest the legality of the arrest of others. 563 F.2d at 632.

In the present case the appellate court's holding directly conflicts with that in *Wright*. In so doing the court extended the reach of the exclusionary rule beyond its purpose, exacting a "substantial social cost" and unnecessarily keeping relevant and reliable evidence

from the trier of fact. *Rakas v. Illinois*, 439 U.S. 128, 138, 99 S.Ct. 421, 427 (1978). Because of the conflicting conclusions reached by courts of this nation and because of the importance of the question, the People of the State of Illinois request that this Court grant Certiorari.

II.

WHERE PROBABLE CAUSE FOR THE RESPONDENT'S ARREST HAD BEEN ESTABLISHED BETWEEN THE TIME OF RESPONDENT'S INITIAL UNLAWFUL ARREST AND HIS INCRIMINATING STATEMENTS, THERE WAS NO NEED TO DETERMINE WHETHER THE CONNECTION BETWEEN THE RESPONDENT'S INITIAL ARREST AND HIS EVENTUAL STATEMENTS HAD BEEN ATTENUATED.

By holding that there were insufficient legitimate factors to sever the causal connection between the respondent's improper arrest and his statement to the police, the Illinois Appellate Court begged a larger question. At the time the respondent gave his statements, the police, through the detailed statements of the co-arrestees, had established probable cause for the respondent's arrest. This case, therefore, involves the issue of whether there was even any need to conduct an attenuation hearing as required by *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975).

The concept of "later acquired probable cause," *i.e.*, the development of probable cause while a person previously arrested without probable cause is in custody, has been the subject of inconsistent treatment in both Federal and State courts throughout the country. It is an issue, however, which has never been addressed by this Court.

Basically, courts have taken two different approaches to the issue. The first is to treat the intervening probable cause as a "severing event," which totally breaks the causal connection between the illegality of the arrest and evidence later acquired from the suspect. The second approach is to look upon the evidence establishing intervening probable cause as simply another factor to be considered in an attenuation analysis to determine whether the taint of the illegality involved in the arrest has been purged.

The court in *Virgin Islands v. Gereau*, 502 F.2d 914 (3rd Cir. 1974), was faced with an instance of intervening probable cause where the defendant had been arrested illegally, but while he was in custody, grounds for an arrest developed independently of the arrest. In the following language the court recognized the folly of applying the exclusionary rule to such a situation: "It would be a meaningless charade to require police to march suspects to the station-house door, 'release' them and then rearrest them, or even worse to make police give suspects a head start before pursuing them for a lawful rearrest." 502 F.2d at 925.

Gereau was cited in *United States ex rel. Wright v. Cuyler*, 563 F.2d 627 (3rd Cir. 1977), which is factually very similar to the present case. In *Wright* the defendant was arrested along with several others without probable cause in what a lower court characterized as a dragnet. While the defendant was in custody others arrested with him gave statements implicating themselves and the defendant. After being confronted with these statements, the defendant incriminated himself. The Third Circuit approved of the admission of the

defendant's statement since at the time it was made the police had probable cause to arrest the defendant on the basis of the other statements. The court treated the acquisition of probable cause while the defendant was in custody, not merely as an attenuating factor, but as an event entirely severing any causal relation between the arrest and statement. In the language of the court: "Since Wright's detention was proper before he confessed, any connection between his assumed illegal arrest and the inculpatory statement had been severed." 563 F.2d at 631.

A Texas court used similar reasoning to uphold the murder conviction of a defendant who was arrested without probable cause since, while he was in custody, the police acquired probable cause. *Townsley v. State*, 652 S.W.2d 791 (Tex. Ct. Crim. App. 1983). The court held that at the point the police acquired probable cause the defendant was legally confined. "Thus any questioning following this time was not tainted by a Fourth Amendment violation." 652 S.W.2d at 797. In *State v. Gifford*, 558 So.2d 444 (Fla. App. 1990), the court concluded similarly saying that "the officer had no realistic alternative but to order the appellee detained rather than released and rearrested." 558 So.2d at 445.

In contradistinction to these cases, other jurisdictions simply look upon later acquired probable cause as one of the factors to be considered in an attenuation analysis focusing on the question of whether the offender's confession is sufficiently the product of his free will to purge the taint of the illegal arrest. *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S.Ct. 407, 417 (1963). This was the approach of the appellate court in the present

case. It was also followed in *United States v. Manuel*, 706 F.2d 908 (9th Cir. 1983), where the defendant confessed following his arrest without probable cause. Since the police had obtained probable cause after the arrest but before the confession, however, the court set out to determine whether the acquisition of probable cause was one of the attenuating factors which might purge the taint of the illegal arrest. Several other courts have taken the same approach. *State v. Reffitt*, 145 Ariz. 452, 702 P.2d 681 (Ariz. Sup. Ct. 1985); *State v. Yeates*, 112 Idaho 377, 732 P.2d 346 (Idaho App. Ct. 1987); *State v. Stevens*, 574 So.2d 197 (Fla. App. Ct. 1991).

At the heart of this issue is a question of the reach of the exclusionary rule, or how far to extend the "fruit of the poisonous tree" doctrine. It is clear that the exclusionary rule does not reach all evidence which would not have been obtained "but for" the illegal conduct of the police. *Brown v. Illinois*, 422 U.S. 590, 603, 95 S.Ct. 2254, 2261 (1975). Rather, the "exclusionary rule had traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion." *Wong Sun*, 371 U.S. at 485, 83 S.Ct. at 416.

The only "unlawful invasion" in this case and those like it is the seizure of the respondent without probable cause. Whether that invasion should be considered to exist even after probable cause is established is an issue never satisfactorily resolved by the courts of this nation. For this reason the People of the State of Illinois request that this Court grant their Petition for Certiorari.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully prays that this Honorable Court grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

JAMES E. RYAN
Attorney General
State of Illinois

WILLIAM L. BROWERS
Assistant Attorney General
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601

Attorneys for Petitioner

RICHARD A. DEVINE
State's Attorney
Cook County, Illinois

RENEE COLDFARB*
KENNETH T. McCURRY
Assistant State's Attorneys
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496

Of Counsel

*Counsel of Record

APPENDIX

APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SIXTH DIVISION
November 26, 1977

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
vs.	)	
DONELL AUSTIN,	)	The Honorable Daniel M. Locallo, Judge Presiding.
Defendant-Appellant.	)	

PRESIDING JUSTICE GREIMAN delivered the opinion of the court:

Following a bench trial, defendant was convicted of first degree murder, armed robbery, and conspiracy to commit first degree murder. Defendant now challenges those convictions, raising three issues: (1) whether the trial court erred in refusing to suppress his confession by reason of its attenuation subsequent to defendant's unlawful arrest; (2) whether the evidence supports the convictions; and (3) whether the trial court erred in imposing consecutive sentences.

For the reasons that follow, we hold that the trial court erred in refusing to suppress defendant's confession. We reverse the conviction and remand for a new trial.

On November 16, 1992, Rufus Simpson was found murdered. He had been shot in the back of the head twice. Simpson's vehicle and some other property were missing from his home. More than two months later, on January 23, 1993, police recovered the remains of the burned-out vehicle near the residence of Bobby Walley. Detective Michael Flemming reviewed telephone records, which indicated that phone calls had been made between Eric Watkins' residence (stepson of the victim), the victim's residence, and Bobby Walley's residence. On January 27, 1993, Fleming and officer observed defendant, Jamal Dorrough, Kevin Taylor, and Bobby Walley leave Walley's residence. At approximately 2:30 p.m., the officers brought the four men to the police station and placed them in separate interview rooms.

At 3:30 p.m., Fleming spoke with Taylor. Taylor denied any knowledge of the homicide. At 3:45 p.m., Fleming spoke with Dorrough after advising him of his Miranda rights. Dorrough made no admissions. At 4 p.m., Fleming spoke with Walley after administering the Miranda admonition. This conversation lasted approximately 15 minutes, during which time Walley made no admissions. At 4:15 p.m., Fleming spoke with defendant after reading defendant his rights against self-incrimination. That conversation also lasted approximately 15 minutes; defendant made no admissions.

At 4:30 p.m., Fleming had a second conversation with Taylor, who admitted knowledge of the homicide, stating that he had a conversation with Dorrough a week after the homicide in which Dorrough stated that the victim was dead and that "they" had done it, meaning defendant, Dorrough, Walley, and Eric Watkins. Taylor also

stated that he had a conversation with Watkins wherein Watkins told him that they had done the killing. Taylor acknowledged that he was at Walley's residence prior to the murder and heard a conversation in which Watkins stated that he wanted his stepfather killed.

At 5 p.m. Fleming had a second conversation with Dorrough and confronted him with Taylor's statements. Dorrough stated that he was part of the conversation in which Watkins indicated that he wanted to have his stepfather killed and further admitted being present when Simpson was killed. He identified defendant as the shooter and described how it was accomplished. He admitted taking property from the residence.

At 5:30 p.m. Fleming spoke with Walley again, confronting him with the statements from Taylor and Dorrough. Walley then confessed his involvement with the homicide.

At 6 p.m. Fleming spoke with defendant again. He told defendant of the other conversations. Defendant did not make a statement regarding his involvement.

Between 6:30 p.m. and 7:30 p.m., Fleming had further communication with Dorrough and Walley, learning additional facts. At 7:30 p.m. Fleming had a third conversation with defendant, confronting him with the additional facts. Defendant at first conceded that he was at the victim's house at the time of the shooting and admitted taking property. He then admitted he did the shooting.

Defendant, Jamal Dorrough, Bobby Walley, and Eric Watkins were all charged with the murder. No charges were brought against Taylor. Defendant and Walley

moved to quash their arrests and suppress their confessions. Those motions were heard on September 7, 1994, and September 26, 1994, with the motions to quash sustained and their confessions suppressed. Thereafter, the State requested an attenuation hearing and the matter was heard on October 20, 1994.

On April 19, 1995, Dorrough filed a motion to quash and suppress evidence. On August 8, 1995, Dorrough's motion to quash was sustained. Again, the State requested an attenuation hearing. The parties stipulated to the testimony given on September 7 and 26, and October 20, 1994, for the purposes of determining whether Dorrough's statement was attenuated.

On September 7, 1995, the trial court found defendant's, Dorrough's, and Walley's confessions attenuated from their illegal arrests. The court found that the statements obtained from Taylor sufficiently attenuated Dorrough's confession. The court next found Walley's confrontation with the statements of Taylor and Dorrough provided an intervening circumstance so as to purge the taint of his illegal arrest. Similarly, the court found defendant's confrontation with the statements of Taylor, Dorrough, and Walley also provided an intervening circumstance sufficient to purge the taint of his illegal arrest.

After a bench trial, the court found defendant guilty of first degree murder, conspiracy to commit first degree murder, and armed robbery. He was sentenced to consecutive commitment terms of 55 years for murder and 25 years for armed robbery.

On appeal, defendant argues that the trial court erred in finding that his confession was attenuated and in

refusing to suppress his confession. This court will not disturb a trial court's decision on a motion to quash and suppress unless that decision is determined to be clearly erroneous. *People v. Foskey*, 136 Ill. 2d 66, 76 (1990). When neither the facts nor the credibility of witnesses is questioned, and the issue is a question of law, this court reviews *de novo*. *Foskey*, 136 Ill. 3d at 76.

The State argues that the trial court erred in concluding that defendant was illegally arrested. Defendant contends the State is precluded from raising this issue at this time because it failed to properly appeal this issue. Even if this issue is properly before this court, we could not reverse the trial court's finding. We see no error in the trial court's determination that the officers lacked probable cause to arrest defendant when they picked him up on the street. See *People v. Williams*, 164 Ill. 2d 1, 11-12 (1994) (setting forth probable cause analysis).

The determination that defendant was subjected to an illegal arrest does not resolve the question of whether his confession should have been admitted. *People v. Foskey*, 136 Ill 2d 66, 85 (1990). A confession obtained after an illegal arrest may be admissible, if the court determines that it was obtained by means sufficiently distinguishable to be purged of the taint of the illegal arrest. *People v. White*, 117 Ill. 2d 194, 222 (1987). The court should consider several factors: (1) the proximity in time between the arrest and the confession; (2) the presence of intervening circumstances; (3) the purpose and flagrancy of the police misconduct; and (4) whether Miranda warnings were given. *Foskey*, 136 Ill. 2d at 85-86, citing *Brown v. Illinois*, 422 U.S. 590, 603-04, 45

L.Ed. 416, 427, 95 S.Ct. 2254, 2261-62 (1975). The prosecution bears the burden of demonstrating sufficient attenuation. *Foskey*, 136 Ill. 2d at 86 (finding sufficient attenuation); *White*, 117 Ill. 2d at 222 (finding insufficient attenuation).

There is no dispute that appellant was given appropriate *Miranda* warnings. *Miranda* warnings alone, however, cannot always make the act sufficiently a product of free will to break the causal connection between the illegality of an arrest and a confession. *People v. Graham*, 214 Ill. App. 3d 798, 813 (1991).

There is no dispute that approximately five hours elapsed between the time of appellant's illegal arrest and the time of his inculpatory statement. The mere passage of time alone, however, is not sufficient to purge the taint of an illegal arrest. *Graham*, 214 Ill. App. 3d at 813.

Although the police conduct here was technically improper, the officers had some evidence suggesting a nexus between the Walley residence and the murder, and nothing would suggest that their conduct was flagrant. However, nothing in this record suggests a reason to validate an otherwise illegal arrest.

The key issue is to examine what, if any, intervening events occurred between the illegal arrest and the statement. *Graham*, 214 Ill. App. 3d at 813; *People v. Turner*, 259 Ill. App. 3d 979, 992 (1994). The trial court found that the statements of Taylor, Dorrough, and Walley implicating defendant in the murder provided a sufficient intervening event so as to attenuate defendant's illegal arrest from his statement. We disagree.

"An intervening circumstance is one that dissipates the taint of unconstitutional police conduct by breaking the causal connection between the illegal conduct and the confession." *Turner*, 259 Ill. App. 3d at 993. "The confrontation of an arrestee with new information, untainted by the illegal arrest, has been identified as an intervening circumstance that may produce a voluntary desire to confess and thereby support admission of in-custody statements." *People v. Lekas*, 155 Ill. App. 3d 391, 414 (1987) (recognizing intervening circumstance where defendant is confronted with new information secured apart from illegal arrest); see, *e.g.*, *People v. Gabbard*, 78 Ill. 2d 88, 99 (1979) (finding intervening event where defendant confronted with sketch of robbery suspect prepared prior to his arrest and acknowledged sketch resembled him); *People v. Bracy*, 152 Ill. App. 3d 566, 572 (1986) (intervening events found where defendant saw his girlfriend at police station and was told she was cooperating, saw his clothes that had been retrieved from her home, and saw proceeds of robbery at police station); *In re R.S.*, 93 Ill. App. 3d 941, 946-47 (1981) (finding intervening event where defendant confronted with evidence gathered independent of defendant's illegal arrest); but see *Taylor v. Alabama*, 457 U.S. 687, 691-92, 73 L.Ed. 2d 314, 320-21, 102 S.Ct. 2664, 2667-68 (1982) (finding no intervening circumstances merely because defendant was given Miranda warnings three times, visited with his girlfriend and male companion before he confessed, and arrest warrant was filed while he was being interrogated).

Defendant contends his confession was not purged of the taint of the illegal arrest because it resulted from tainted evidence. The trial court found that the use of

Taylor's statement provided a sufficient intervening event. While the court held that defendant, Dorrough, and Walley had been illegally arrested was no finding that Taylor had been illegally arrested since Taylor was not charged. Despite the fact that the record suggested that Taylor was taken to the police station in the same manner as the other men, the trial court refused to find that Taylor had been illegally arrested. The court ruled that defendant lacked standing to contest a violation of Taylor's constitutional rights. *People v. James*, 118 Ill. 2d 214, 226 (1987) (recognizing "fundamental principal that a claim to suppress the product of a fourth amendment violation can be asserted 'only by those whose rights were violated by the search or seizure itself' ").

Defendant argues that the traditional rule for standing does not apply in this case and the statements obtained from the other men may not be used to attenuate his illegal arrest. In *People v. Beamon*, 255 Ill. App. 3d 63, 70 (1993), the court held that "the State's use of evidence obtained as a result of the illegal arrest of [a codefendant] may not serve to attenuate the taint of [another codefendant's] illegal arrest." In *Beamon*, the court found that the standing rule from *James* did not apply because James had not himself been illegally arrested and the issue in *James* was probable cause, not attenuation. *Beamon*, 255 Ill. App. 3d at 70.

In *Beamon*, 255 Ill. App. 3d at 66, the police illegally arrested the codefendant, Moore, at his home a day after a murder occurred. Moore told the police that he had been with Beam the time of the murder. When the police illegally arrested Beamon he told them that on the day of the murder he had remained home ill and he

had not seen Moore. After confronting Moore and Beamon with each other's statements, both defendants confessed. The court held that Moore's statement could not "be relied upon as an intervening circumstance [for Beamon's confession] because Moore's conflicting statement was the result of Moore's illegal arrest." 255 Ill. App. 3d at 69-70 (relying on *People v. Avery*, 180 Ill. App. 3d 146 (1989)).

In *People v. Avery*, 180 Ill. App. 3d 146 (1989), Avery, Lewis and Stofer were charged with murder after all three had been illegally arrested. Stofer was picked up first and told police that he had been at a party with Avery and Lewis the night before and the three had driven around afterwards in a car with another man. Lewis was then picked up and told police that he and Stofer had been at a party and had driven around until 1:30 a.m. An officer confronted Lewis with Stofer's version. Lewis agreed that Avery and another man were with them. The officers then picked up Avery, who told them that Stofer had driven him home at 11:30 p.m. the night before and he retired to bed, after which the officers confronted Avery with Lewis's and Stofer's versions. The officers continued to speak to each of the men several times, eventually securing incriminating statements from each of them. *Avery*, 180 Ill. App. 3d at 150-51.

The appellate court reversed the trial court's finding of attenuation and suppressed Avery's statement. The court rejected the State's argument that an intervening circumstance had occurred when each defendant was confronted with his companion's statements. *Avery*, 180 Ill. App. 3d at 156. "Confronting defendants with state-

ments from each other[,] * * * all of whom were legally arrested, did not constitute an intervening event which purged the taint of the illegal arrests." *Avery*, 180 Ill. App. 3d at 156. Under this analysis, the statements of Taylor, Dorrough, and Walley did not provide an intervening circumstance so as to purge the taint of defendant's arrest.

The State urges this court to follow two prior decisions in which the courts looked to the acquisition of probable cause to be an intervening factor. In *People v. Lekas*, 155 Ill. App. 3d 391, 414 (1987), the court suggested that the development of probable cause to arrest a defendant who had been illegally arrested could provide a basis for purging the taint of a confession obtained after that point. The court stated "one could question the wisdom of requiring police to go through the formality of releasing [the defendant] only to rearrest him outside the jailhouse door." *Lekas*, 155 Ill. App. 3d at 414. In *People v. Pierson*, 166 Ill. App. 3d 558, 564 (1988), the court relied on such reasoning, calling the intervening acquisition of probable cause an "important factor" in attenuation analysis. The court held that a statement obtained from an individual who was arrested by police without probable cause could provide probable cause to attenuate a statement obtained from another individual who was arrested by police under the same circumstances and subsequently charged with a crime. *Pierson*, 166 Ill. App. 3d at 564. We note, however, that *Beamon*, 255 Ill. App. 3d 63, was decided after these cases and its reasoning followed in *People v. Bates*, 267 Ill. App. 3d 503 (1994).

In *Bates*, 267 Ill. App. 3d at 506-07, the defendant confessed after being confronted with legally obtained evidence and with tainted evidence, including a statement from a codefendant that was later found to have been coerced. The court suppressed Bates' statement because it determined that the State failed to prove that the tainted evidence was not a factor in Bates' decision to confess. The court reasoned that the use of the evidence obtained from coercing the codefendant could not serve to attenuate the taint of Bates' illegal arrest. *Bates*, 267 Ill. App. 3d at 507, citing *Beamon*, 255 Ill. App. 3d 63. "Statements made by [the codefendant] about defendant's involvement in the crime and evidence recovered as a result of these statements are tainted." *Bates*, 267 Ill. App. 3d at 506.

We note defendant's concern that to allow the State to use illegally obtained evidence to purge the taint of an illegal arrest as done in this case would provide the prosecution with an incentive to conduct illegal arrests and then validly use the fruits of such improper arrests by merely deciding not to charge one individual in the group.

Based on the analysis of Beamon and Bates, we hold that the trial court erred in finding attenuation. Defendant's confession should have been suppressed as a fruit of the illegal arrest.

We remand this case for a new trial. For the purposes of determining whether the double jeopardy clause bars retrial of a defendant where his conviction has been reversed for evidentiary error, all evidence submitted at the original trial may be considered in determining the sufficiency of the evidence, and retrial is permitted even

though the evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted. *People v. Olivera*, 164 Ill. 2d 382, 393 (1995). Upon review of the record, including defendant's confession, we hold that there was sufficient evidence for the trier of fact to conclude that defendant was guilty beyond a reasonable doubt.

For the foregoing reasons, we reverse defendant's convictions and remand for a new trial in which defendant's confession shall be suppressed. In light of this outcome, we need not address the sentencing issue.

Reversed and remanded.

THEIS, J., concurs.

QUINN, J., specially concurs.

JUSTICE QUINN, specially concurring:

I concur in the holding of the case but write to express a concern with the holding in a case this opinion heavily relies upon. As noted, in *People v. Beamon*, 255 Ill. App. 3d 63 (1993) the court held that, "the State's use of evidence obtained as a result of the illegal arrest of [a co-defendant] may not serve to attenuate the taint of [another co-defendant's] illegal arrest." The court in Beamon further held, "[w]e recognize that in *People v. James* (1987), 118 Ill. 2d 214, 514, N.E.2d 998, the supreme court held that a defendant lacked standing to claim that his confession is the product of the illegal arrest of another; but the defendant in James had him-

self not been illegally arrested. The issue in James was probable cause, not attenuation." *People v. Beamon*, 255 Ill. App. 3d at 70.

It is difficult to understand why probable cause to arrest a defendant may be based on the statement of an illegally arrested co-defendant (as in James) but that this same statement cannot be used as attenuation.

In the instant case, the police did not confront defendant with any further witnesses or evidence obtained as a result of defendant's illegal arrest. This fact pattern is similar to that in *People v. Lekas*, 155 Ill. App. 3d 391 (1987). In *Lekas*, three brothers (George, Phillip and Christopher) were arrested and charged with armed robbery and murder. George was arrested first and he told police that his brothers had owed the murder victim's son money and that at sometime in the past they had talked about stealing a coin collection from the victim's home. A coin collection had been taken from the victim's home at the time the murder was committed. Six hours after receiving this information from George, the police arrested Phillip and Christopher in their homes without obtaining arrest warrants for them. After Phillip and Christopher were arrested, the police located a witness who had been identified by George. Christopher confessed after his arrest. Phillip confessed after being in custody for 12 hours and after being confronted with George's statement, Christopher's statement, and the existence of the witness.

The trial court suppressed George's statements as being the product of improper police promises. The trial court held there was probable cause for the arrest of Phillip and Christopher.

On appeal, the appellate court held that even if Phillip's arrest should have been quashed, his confession was attenuated due to the intervening cause of attainment of probable cause. The appellate court held that since George's statement, Christopher's statement, and the existence of the witness were not the fruits of Phillip's arrest, Phillip's subsequent; confession was not tainted. *People v. Lekas*, 155 Ill. App. 3d at 414.

Under *Lekas*, I believe that the defendant's confession would be attenuated. I also believe that the holding in *Beamon* conflicts with the holding in James.

The court in *Beamon* did not cite Lekas or distinguish it. Likewise, the *Beamon* opinion did not cite or distinguish *People v. Pierson*, 166 Ill. App. 3d 558 (1988). The status of Kevin Taylor in the instant case is very similar to that of Alfie Jones in the *Pierson* case. Jones was picked up by the police without probable cause and gave a statement implicating Pierson but not implicating himself. The appellate court in Pierson held that under these circumstances, the statements of James provided probable cause as to the unlawfully arrested defendant. This probable cause is an intervening circumstance which was a significant factor to be considered when determining whether there is attenuation. *People v. Pierson*, 166 Ill. App. 3d at 564.

The defense urges this court to overrule Pierson, asserting that its holding provides the prosecution with an incentive to conduct illegal arrests and then validly use the fruits of such improper arrests by merely deciding not to charge one individual in the group. This is not a valid concern based on the facts of the instant case. There is no evidence that Kevin Taylor was in-

volved in any way with the murder of Rufus Simpson. Therefore there was no evidence that the State chose not to charge Taylor so they could use his statements to supply the probable cause to arrest Dorrough, Walley and defendant. Indeed, had defendant confessed after being confronted only with Taylor's statements, I believe defendant's confession would have been attenuated. However, defendant was also confronted with Dorrough and Walley's confessions prior to confessing himself. Under *Beamon*, Dorrough and Walley's confessions were tainted. When a defendant is confronted with legally obtained evidence (such as Taylor's statements) and with tainted evidence (such as Dorrough and Walley's confessions), it is the State's burden to prove that the tainted evidence was not a factor in his decision to confess. *People v. Bates*, 267 Ill. App. 3d 503, 507 (1994), citing *People v. Turner*, 259 Ill. App. 3d 979 (1994). The State has not met this burden in this case.

I believe that I am compelled to follow the holding in *Beamon* and therefore I concur in the result of this case. However, I believe that the holding in *Beamon* conflicts with the holdings in Lekas and James and these conflicts should be resolved.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

84644

April 1, 1998

Ms. Jessica R. Ball
Assistant State's Attorney
309 Richard J. Daley Center
Chicago, IL 60602

No. 84644 - People State of Illinois, petitioner, v. Donell Austin, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this court will issue to the Appellate Court on April 23, 1998.

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
OCT 20 1998
CLERK

No. 98-43

In The
SUPREME COURT OF THE UNITED STATES
October Term 1997

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

DONELL AUSTIN,
Respondent.

MOTION FOR LEAVE TO FILE IN *FORMA PAUPERIS*

Now comes the respondent Donell Austin, by his attorney James Geis, contract attorney for the Office of the State Appellate Defender, and moves for leave to file his Brief in Opposition in *forma pauperis*.

In support thereof he states:

1. As stated in the attached affidavit: Respondent has been continually incarcerated since January 27, 1993; respondent has not received any income, other than prison wages, from employment or investments since that date; respondent has no cash, checking or savings accounts; and, respondent owns no income producing assets or valuable property.

2. Respondent was declared indigent in the Circuit Court of Cook County and represented by the Cook County Public Defender throughout the trial court proceedings in this case. After conviction and sentence was imposed in this case, the trial judge found

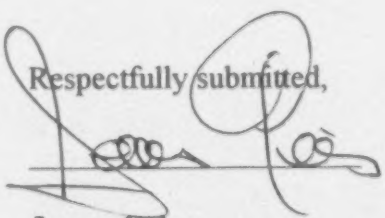
respondent remained indigent and ordered that a free transcript of the trial court proceedings be prepared and accordingly the court appointed the Office of the State Appellate Defender to represent respondent on appeal.

3. Respondent is currently represented by the Office of the State Appellate Defender, by contract attorney Mr. James Geis.

4. Respondent is financially unable to pay the printing costs necessary to file the Brief in Opposition in compliance with Supreme Court Rule 33(1).

WHEREFORE, respondent respectfully prays that this Honorable Court will grant this Motion for Leave to File in *Forma Pauperis*.

Respectfully submitted,



* **James Geis**
James Geis Law Office
5647 South Drexel Avenue
Chicago, Illinois 60637
773-667-9303

Michael J. Pelletier
Deputy Defender
Office of the State Appellate Defender
100 West Randolph Street
Suite 5-500
Chicago, Illinois 60601
312-814-5472

Counsel for Respondent

*** Counsel of Record**

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERS

UNITED STATES SUPREME COURT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 98-43**
	)	
DONELL AUSTIN,	)	
	)	
Respondent,	)	

Affidavit in Support of Motion to Proceed in Forma Pauperis

I, Donell Austin being first duly sworn, depose and say that I am the respondent , in the above entitled case; that in support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of such proceedings or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? **NO. I AM PRESENTLY, AND HAVE BEEN SINCE JANUARY 27, 1993, INCARCERATED**

2. Have you received within the last twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? **NO**

3. Do you own any cash or checking or savings account? **NO**

4. Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property? **NO**

5. List the persons who are dependent upon you for support and state your relationship to those persons. **NONE**

Donell Austin

Donell Austin
Register No. B-75784
Menard Correctional Center
Menard, Illinois 62259

SUBSCRIBED AND SWORN TO before me this 14th day of October, 1998

Notary Public

OFFICIAL SEAL
JAMES GEIS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 05/01/00

No. 98-43

In The

SUPREME COURT OF THE UNITED STATES

October Term 1997

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

DONELL AUSTIN,

Respondent.

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

* James Geis
James Geis Law Office
5647 South Drexel Avenue
Chicago, Illinois 60637
773-667-9303

Michael J. Pelletier
Deputy Defender
Office of the State Appellate Defender
100 West Randolph Street
Suite 5-500
Chicago, Illinois 60601
312-814-5472

Counsel for Respondent

* Counsel of Record

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No. 98-43

In The

SUPREME COURT OF THE UNITED STATES

October Term 1997

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

DONELL AUSTIN,

Respondent.

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Donell Austin, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Illinois Appellate Court's opinion in this case. That decision is reported at 293 Ill. App.3d, 688 N.E.2d 740 (1st Dist. 1997).

QUESTION PRESENTED FOR REVIEW

Whether the trial court's finding that respondent's statement was attenuated from the circumstances surrounding his illegal arrest was manifestly erroneous? [1]

STATEMENT OF THE CASE

The following pertinent facts are either unclear or omitted from the petition:

There were three rounds of interviews at the police station. During each interview the four men were interviewed in the same order. Kevin Taylor was first, Jamel Dorrough was second, Bobbie Walley was third, and the respondent was last. During the first round, nobody made a statement. During the second round, Taylor was the first person to make a statement implicating the other three men. When confronted with Taylor's

---

[1] In the appellate court, in his opening brief, respondent stated the issue as a factual issue:

> The trial court's ruling that the effect of the illegal arrest was attenuated by two independent intervening events is manifestly erroneous because the underlying factors are not supported by the evidence. (Respondent's brief in the Illinois Appellate Court, p. iv).

The petitioner, in its answering brief, re-stated the issue as:

> Whether the trial court erred when it found that defendant's statement was attenuated from his illegal arrest. (Petitioner's brief in the Illinois Appellate Court, p. 5).

statement, Dorrough admitted his own involvement. In the process of doing so, Dorrough also implicated Walley and the respondent. Then, after Walley was confronted with the information the police had compiled from the first two arrestees, Walley confessed his involvement. At the end of the second round, after being confronted with all the information the police had accumulated up to that point, respondent still did not make a statement. Respondent finally made a statement at the end of the third round, after the police had obtained additional information from Dorrough and Walley. From the time respondent was initially arrested until he confessed, approximately five hours elapsed. (Appellate Court Opinion, Pages 1-4).

At the suppression hearing, Detective Fleming testified that all four men had voluntarily agreed to accompany him to the police station. (Supplemental Record, p. 16). The trial judge found that none of the four men had voluntarily accompanied Detective Fleming to the police station and the court granted respondent's motion to suppress. The petitioner then requested the court to hold an attenuation hearing. (Supplemental Record, p. 122).

During the course of the trial court proceedings, it was judicially determined that Dorrough, Walley and respondent were illegally arrested. (Appellate Court Opinion, Pages 3-4). The legality of Taylor's arrest was never judicially determined because Taylor was never charged with a criminal offense.

Supreme Court Rule 14 (g)(i) requires that The Statement of the Case section of the Petition for Writ of Certiorari shall describe the history of the presentation of the

federal question in the state courts. The petition does not comply with the Rule.

The Fourth Amendment question was first raised when respondent filled a pre-trial motion to quash his arrest and suppress his confession. After it was determined that the arrest violated respondent's Fourth Amendment rights, the prosecution requested an attenuation hearing. The trial judge specifically found that the statements of Taylor, Dorrough, and Walley "were an intervening circumstance sufficient to purge the taint of Austin's illegal arrest." (Record on Appeal, C87-88; Trial Court Order, Pages 18-19). The trial judge reasoned "The statement from Kevin Taylor was "untainted" and properly obtained. Taylor was never charged with any offense involving the murder of Rufus Simpson. Accordingly, this statement could be utilized to attenuate the illegality of [respondent's] arrest." (Record on Appeal, C83; Trial Court Order, Page 14).

In the appellate court, the petitioner adopted the same rationale as the trial judge had used to find attenuation. The petitioner urged that the intervening circumstances, the information the police had obtained and confronted respondent with, was untainted because it all stemmed from Taylor, and Taylor's arrest had never been judicially declared to be illegal. (Petitioner's brief in Illinois Appellate Court, Pages 20-22). The appellate court held that the petitioner had failed to prove that tainted evidence was not a factor in respondent's decision to confess and therefore the sanction of exclusion was required.

In its Petition for Leave to Appeal to the Illinois Supreme Court, the petitioner urged that there was a conflict in Illinois in regard to the question of whether the

prosecution could use tainted probable cause to attenuate an illegal arrest and that the line followed by the appellate court in this case was "rudimentarily flawed." (Petition for Leave to Appeal, Page 12). Also, the petitioner urged the Illinois Supreme Court to correct, what the petitioner claimed was, the appellate court's mistaken belief that the respondent had standing to assert his co-arrestees's constitutional rights. (Petition for Leave to Appeal, Pages 12-16).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The first Question Presented in the petition is:

> Whether a criminal defendant can object to the use of a statement of a co-arrestee, who is in custody without probable cause, to establish probable cause for the defendant's arrest or to establish that any taint of the illegality involved in the defendant's arrest was attenuated. (Petition, Page i).

(A) Certiorari should be denied because the decision below does not raise the Question Presented.

The question of whether a defendant can object to the police obtaining probable cause to detain him, from a co-arrestee, regardless of how obtained, has never been an issue in this case. Because a criminal defendant does not have standing to assert another person's constitutional right, it is settled that the police do not have to set a suspect free if the knowledge for his legal detention was the result of a violation of another's constitutional rights. See *Alderman v. United States*, 394 U.S. 165, 171-76, 89 S.Ct. 961, 965-68. In this case, respondent never claimed that his arrest at the police station should be quashed.

The second part of the Question Presented, whether a criminal defendant has standing to object to the prosecution's use of a co-arrestee's statement as an attenuating factor is not an issue in this case either. That is so because respondent never "objected" to the prosecution's use of the co-arrestees' statements against him. Those statements were available for the prosecution to use during the trial. In the state courts, it has been the petitioner who has been consistently attempting to keep the circumstances surrounding the acquisition of those statements out of the attenuation equation.

What the respondent did claim below is that for purposes of the exclusionary rule, the information the police gained from the co-arrestees was so infected with police misconduct, intertwined with the circumstances of respondent's own illegal arrest, and so instrumental in his eventual decision to confess, that it would thwart the goal of the exclusionary rule to attribute to that information the quality of an untainted independent intervening circumstance. The appellate court agreed.

The petitioner's Question Presented confounds the concept of standing with the concept of attenuation. Standing is necessary to claim a Fourth Amendment violation. Once that Fourth Amendment violation is found, as happened in this case, the violation affords the defendant whose own constitutional right was violated the privilege of invoking the exclusionary rule. See *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct 613. Attenuation analysis does not begin until a court has determined that a defendant's Fourth Amendment right was violated.

At page 10 of its petition, petitioner incorrectly characterizes the appellate court

decision as reasoning that the State could not use the statements of the co-arrestees as attenuating factors " . . . because those statements themselves were obtained in violation of the co-arrestees' Fourth Amendment rights." The question of whether the co-arrestee's constitutional rights were violated was never presented to the appellate court and the appellate court never considered that question. The appellate court actually held:

> " . . . Confronting defendants with statements from each other [,] * * * all of whom were legally [sic] arrested, did not constitute an intervening event which purged the taint of the illegal arrests." Avery, 180 Ill. App. 3d at 156. Under this analysis, the statements of Taylor, Dorrough, and Walley did not provide an intervening circumstance so as to purge the taint of defendant's arrest. (App. 10; 688 N.E.2d at 744).

For attenuation purposes, the appellate court reviewed all the facts to determine if the trial judge's finding that some untainted independent intervening event had occurred was supported by the record. The appellate court determined the trial court's finding was clearly erroneous. (See *People v Foskey (*1990), 127 Ill. 2d 66, 554 N.E.2d 192 holding that the trial court's ruling on a motion to suppress will not be disturbed unless clearly erroneous).

(B) Certiorari should be denied because the appellate court's holding does not conflict with the holding in *United States ex. rel Wright v. Culyer*, 563 F.2d 627 (3rd Cir. 1977). [2]

As explained in section (A), the appellate court did not hold that the exclusionary rule was appropriate in this case because the co-arrestee's Fourth Amendment rights were violated. Moreover, the language petitioner extracts from the *Wright* opinion to mark the supposed conflict is misleading because it is presented out of context.

The intervening probable cause at issue in *Wright* was the after acquired information the police obtained from a man named Cochran. The police gained that information while Wright was being illegally detained. The Court of Appeals made factual findings that "There is no evidence in the record that Cochran's arrest was either legal or illegal," and, "Wright was not informed of Cochran's statement and, therefore, that disclosure could not have influenced petitioner's decision to confess." *Wright, Id.* 563 F.2d at 631.

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[2] The Pennsylvania Supreme Court affirmed Wright's conviction in *Commonwealth v. Wright*, 460 Pa. 247, 332 A.2d 809 (1975). The subject of the Third Circuit opinion that petitioner cites is the denial of Wright's federal habeas corpus petition. The Third Circuit holding is consistent with the Pennsylvania Supreme Court's holding that Wright's confession was admissible, since it was not causally related to the invasion of the defendant's rights.

The Illinois Supreme Court has twice cited the analysis in *Commonwealth v. Wright* favorably and relied on it. See *People v. Gabbard* (1979) 78 Ill. 2d 88, 398 N.E.2d 574 and *People v. White* (1987), 117 Ill. 2d 194, 512 n.E.2d 677, cert. denied (1988), 485 U.S. 1006, 108 S.Ct. 1469.

The attenuation finding in *Wright* is based on the fact that the intervening probable cause was untainted and the information could not have possibly affected Wright's decision to confess. The language in the *Wright* opinion at 563 F.2d 631, stating, "Indeed, even if it were illegal [Cochran's arrest], petitioner would have no standing to raise the issue here," is directed to suggest that under the circumstances the only possible way Wright could benefit from what had happened to Cochran was if he possessed the standing to quash Cochran's arrest and to suppress Cochran's statement. That is so because whatever happened to Cochran, it had no causal connection to Wright's illegal arrest; moreover, since Wright was never confronted with Cochran's statement, whatever happened to Cochran obviously was unrelated to Wright's decision to confess.

II. The second Question Presented in the petition is:

> Whether, if the statement of an illegally arrested co-arrestee establishes probable cause for a criminal defendant's arrest completely independent of the defendant's initial arrest without probable cause, it is necessary for the prosecution, in order to avoid the imposition of the exclusionary rule, to establish attenuation between the defendant's initial illegal arrest and evidence recovered after probable cause has been established. (Petition, Page i)

(A) Certiorari should be denied because neither the decision below nor the record raises the Question Presented in the petition.

The essential factual predicate contained in petitioner's Question Presented is missing from this case. Whether or not the information the police used to confront respondent in order to persuade him to confess was "completely independent" is precisely the question the appellate court resolved against petitioner. If the information had been

"completely independent," as the Question Presented represents, undoubtedly the appellate court would have affirmed the trial court's attenuation ruling.

The information the police confronted respondent with was the product of the exact same police misconduct that resulted in respondent's initial detention. Moreover, the illegally seized information was the only thing that the police used to persuade the respondent to confess after approximately five-hours of interrogation. After examining the facts of this case, the appellate court determined that the trial judge's determination that the information obtained was "completely independent" was clearly erroneous.

Assuming arguendo that the information the police obtained from the co-arrestees had been "completely independent," that Question Presented (*i.e.*, whether an attenuation hearing should ever be held if probable cause exists) was never presented to the courts below. The appellate court did not decide that Question Presented because, until this petition, the petitioner had never claimed that an attenuation hearing was unnecessary. In fact, in the trial court the petitioner was the one who sought the attenuation hearing, after the trial court had ruled that respondent's Fourth Amendment rights were violated. By failing to object to the attenuation hearing in the trial court, the petitioner failed to preserve for review the principal it now urges in this Court. (See *People v. O'Neil* (1984), 104 Ill. 2d 399, 472 N.E.2d 441 holding the State was precluded from arguing ground in support of trial court's ruling where it relied on different ground at trial). Certiorari should be denied because petitioner's litigation posture with respect to the Question Presented has not been consistent. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105

S. Ct. 2427 91985), *Canton v. Harris* ,489 U.S. 378, 384, 109 S. Ct. 1197 (1988).

(B) Certiorari should be denied because the question of whether probable cause automatically precludes the sanction of exclusion was answered in *Taylor v. Alabama*, 457 U.S. 687 (1982).

The circumstances involved in *Taylor v. Alabama*, 457 U.S. 687, 102 S. Ct. 2664 (1982) parallel the circumstances of this case. As in *Taylor*, respondent was arrested without probable cause, transported to police headquarters, advised of his Miranda rights, and interrogated. As in *Taylor*, while respondent was being illegally detained and interrogated, the police obtained information which gave them probable cause to arrest him. As in *Taylor*, that information was intertwined with the police misconduct which brought about the initial illegal arrest. As in *Taylor*, respondent's confession was prompted by the police using the illegally obtained information to confront him. And, also as in *Taylor*, the only intervening circumstance that existed in the case was tainted because it flowed from the initial police misconduct

In this Court, one of the significant "intervening events" the State relied on to attenuate the violation of Taylor's Fourth Amendment right was the fact that before Taylor made a statement, an arrest warrant had been filed. The State urged that the intervening arrest warrant constituted an independent intervening event and severed any connection between the Fourth Amendment violation and the subsequent statement. This Court held "The filing of the warrant, however, is irrelevant to whether the confession was the fruit of the illegal arrest." *Taylor, Id.* 457 U.S. at 692.

Moreover, at Page 13 of its petition, the petitioner acknowledges that, even prior to

Taylor, in *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S.Ct. 407, 417 (1963), this Court looked upon later acquired probable cause, not as per se severing event, but as one of the factors to be examined in attenuation analysis.

This Court has already recognized that the acquisition of probable cause by the police after the illegal arrest but before the suspect's voluntary statement neither logically breaks the causal chain between the two as a matter of course nor, in view of the purposes of the exclusionary rule, necessarily attenuates the relationship between the arrest and the confession to the point the evidence need not be excluded. Petitioner has not advanced any reason, either legal or pragmatic, why *Taylor* should be revisited.

(C) Certiorari should be denied because there is no conflict of State or Federal authority on the question of whether after acquired probable cause always cures a Fourth Amendment violation.

Petitioner represents that reviewing courts are divided on the question of whether after-acquired probable cause always forecloses exclusion of evidence seized in violation of the Fourth Amendment. It cites *Virgin Islands v. Gerau*, 502 F.2d 914 (3rd Cir. 1974), *United States ex rel. Wright v. Culyer*, 563 F.2d 627 (3rd Cir. 1977), *Townsley v. State*, 652 S.W.2d 791 (Tex. Ct. Crim. App. 19830 and *State v. Gifford*, 558 So.2d 444 (Fla. App. 1990), as decisions which " . . . treat the intervening probable cause as a "severing event," which totally breaks the causal connection between the illegality of the arrest and evidence later acquired from the suspect." (Petition, Page 12). Petitioner has misstated the breadth of the holdings in those cases.

That line of cases is factually distinguishable from this case, in a crucial way. In

every one of the cases the after acquired probable cause was independent from the Fourth Amendment violation and also untainted. Moreover, in every one of petitioner's cases the information did not affect the suspect's decision to confess because the suspect was never confronted with the information. In other words, probable cause was deemed to be a severing, or attenuating, event in the cited cases because the police received no benefit from their unlawful conduct. Thus, little was to be gained by imposing the sanction of exclusion.

In *Gerau*, while he was in custody as the result of an illegal arrest, an untainted warrant issued for Gerau's arrest prior to the confession. In *Wright*, while Mr. Wright was in custody as the result of an "assumed" illegal arrest, the police obtained independent probable cause to hold him. In *Townsley* "By way of contrast [to the facts in *Taylor v. Alabama*], none of the information used to establish probable cause in the instant case was the fruit of an illegal arrest." *Townsley v. State* 652 S.W.2d at 797. In *Gifford*, subsequent to the initial unlawful arrest, the police obtained untainted independent probable cause to legally detain and interrogate Mr. Gifford.

In order to approve the sanction of exclusion in the above cases, those courts would have had to adopt the "but for" test, which this Court rejected in *Wong Sun*. The sanction of exclusion in those cases would have imposed greater costs on law enforcement than can be justified by the rules' deterrence purposes. Other than giving the police access to the suspect, the misconduct had nothing to do with the confessions in those cases. The suspects would have received the windfall of exclusion when the police

conduct was in good faith, minor, and only tangentially related to the confession.

Although the appellate court reached a different result in this case, it used the same analysis as did the courts in *Gerau*, *Wright*, *Townsley*, and *Gifford*. Recognizing that the interrogation in this case was completely infected with seamless police misconduct from arrest to confession, the appellate court found that exclusion was a necessary sanction because the opposite result would provide the police with an incentive to repeat such misconduct. That ruling does not conflict with any other authority.

(D) Certiorari should be denied because the Court has historically refused to apply a bright line rule, running in either direction, to determine if the exclusionary rule should be applied after a Fourth Amendment violation.

In *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct 2254 (1975), the State also asked this Court to establish a bright line rule to sever the relationship between police misconduct and a subsequent statement. In *Brown*, it was the giving of Miranda warnings that the State urged should always constitute an intervening independent act to remove the taint of a prior Fourth Amendment violation. The Court rejected the *per se* rule that the Illinois Supreme Court had adopted in that case:

> The question whether a confession is the product of free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. *Brown v. Illinois*, Id. 422 U.S. at 603

In *New York v. Harris*, 495 U.S. 573, 110 S. Ct. 1640 (1989), although the Court

held that the constitutional violation was attenuated, nevertheless the Court again disavowed the concept that legal custody always trumps an attenuation inquiry. (See *New York v. Harris*, 495 U.S. (1989) 'We do not hold, as the dissent suggests, that a statement taken by the police while a suspect is in custody is always admissible as long as the suspect is in legal custody.")

In *United States v. Cherry*, 759 F.2d 1196, (5th Cir. 1985), relying on this Court's language in *Brown*, the Court of Appeals rejected the same argument that petitioner is advancing in this case. That court held that the intervening advent of probable cause was not by itself sufficient to render a defendant's consent free from taint. (See *United States v. Cherry*, Id. 759 F.2d at 1212, stating "The intervening discovery of probable cause to support a suspect's detention, by itself, "cannot assure in every case that the Fourth Amendment violation has not been unduly exploited." *Brown v. Illinois*, 422 U.S. at 603, 95 S.Ct. at 2261.")

(E) Certiorari should be denied because rejection of the attenuation analysis that was used by the appellate court will undermine the purpose of the exclusionary rule.

The basic purpose of the exclusionary rule is to remove possible motivations for illegal arrests. "The rule is calculated to prevent, not to repair. Its purpose is to deter and to compel respect for the constitutional guaranty in the only effectively available way and by removing the incentive to disregard it." *Brown, Id.*, 422 U.S. at 599-600 quoting *Elkins v. United States* 364 U.S. 206, 217 (1960). As the Court announced in *Brown, Id.*,

422 U.S at 602, "*Wong Sun* thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment."

If after acquired probable cause, by itself, is held to attenuate the taint of an unconstitutional arrest in every case, regardless of how that information is acquired by the police, the exclusionary rule could not serve its purpose. Illegal arrests and prolonged detention would be encouraged by the knowledge that the eventual discovery of probable cause is waiting in the wings, and if found, it will serve as the cure all for the preceding police misconduct.

This case presents a compelling example of why a bright line rule would eviscerate the exclusionary rule in cases like this one. The police misconduct at issue, the illegal arrests of the four men in front of the Walley residence, did not merely provide the initial contact between the police and respondent. That exact same police misconduct is also the source of the cure that the petitioner is prescribing. But for the police misconduct in this case there would have been no intervening probable cause. But for the police misconduct in this case, the police would have had no information to use to confront respondent with to persuade him to give up his silence. Adoption of a bright line rule that absolutely forecloses judicial examination of such conduct will not prevent misconduct, rather, it will encourage unconstitutional dragnet arrests.

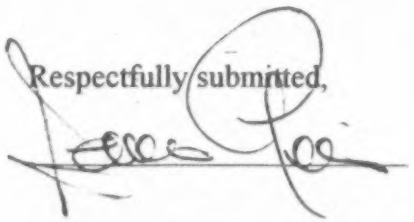
On the other hand, the law currently in effect does not handicap lawful police work. In this case, if the circumstances surrounding the acquisition of the information the police used to confront respondent with had been obtained independent of police

misconduct, then it would have served to attenuate the violation of respondent's Fourth Amendment rights.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



* James Geis
James Geis Law Office
5647 South Drexel Avenue
Chicago, Illinois 60637
773-667-9303

Michael J. Pelletier
Deputy Defender
Office of the State Appellate Defender
100 West Randolph Street
Suite 5-500
Chicago, Illinois 60601
312-814-5472

Counsel for Respondent

* Counsel of Record